Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

—o—

No. 79-1701

—o—

EDWIN GRANT HAMILTON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of Montana respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at 605 P. 2d 1121.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The question presented in the petition is not sufficiently important to warrant this Court's review.

The decision of the Montana Supreme Court below turns upon the peculiar facts of this case alone. The court below stated as much: "In the present case, however, we have a unique situation." Because a phone call had been made to the police department from the defendant's residence prior to or during the altercation resulting in the victim's death, a police officer heard the defendant's statements during the struggle, including these: "Goddamnit, die. . . . Die you bitch. Goddamnit, die. Are you going to die or not? Die, Damnit. . . ." The Montana court based its holding on a "careful read[ing of] the record," and reached its conclusion "[i]n the light of the evidence." 605 P. 2d at 1132-33. Now the petitioner is asking this Court to again examine all of the evidence, including the unique factual situation presented, and determine if "[t]he Montana Supreme Court err[ed] . . . under the facts of this case." Petition at 3. Because those facts are unlikely to recur, this Court's determination would affect only the defendant in this case.

The jury instruction challenged in this case, which had been approved by the Montana Supreme Court at the time of defendant's trial, *State v. Caryl,* 168 Mont. 414, 426-28, 543 P. 2d 389, 396-97 (1975), was declared unconstitutional by this Court nearly one year ago. *Sandstrom v. Montana,* 99 S. Ct. 2450 (1979). The instruction is no longer given. Any question concerning its harmlessness is unlikely to arise in the future. Consequently, the issue

is not sufficiently important to warrant this Court's review.

2. The result below was correct.

The Montana Supreme Court correctly applied the test for harmless constitutional error, set forth in *Chapman v. California,* 386 U. S. 18, 24 (1967), and *Harrington v. California,* 395 U. S. 250, 254 (1969), to the facts of this case, and declared its belief that the error in giving the challenged instruction was harmless beyond a reasonable doubt.

This Court's decision in *Sandstrom v. Montana, supra,* 99 S. Ct. 2450, did not preclude such a determination of harmless constitutional error. That issue was specifically left open for consideration by the state court. 99 S. Ct. at 2460-61. The state court did consider that issue on remand, finding upon the evidence presented in that case that the error had not been harmless beyond a reasonable doubt. *State v. Sandstrom,* — Mont. —, 603 P. 2d 244 (1979). A comparison of the facts of that case and the instant one emphasizes the correctness of both.

In *Sandstrom,* the testimony was that the defendant stabbed the victim to "silence" her screams, but not to kill her. No other witness heard or saw the crime. *State v. Sandstrom,* — Mont. —, 580 P. 2d 106, 107-08 (1979), *rev'd, supra,* 99 S. Ct. 2450 (1979). Under these facts, an instruction requiring the jury to presume that the defendant intended the ordinary consequences of his repeated stabbing of the victim could not be harmless. In the instant case, by comparison the evidence included the statements defendant made while he was strangling the victim,

expressing his desire that she die. This evidence was uncontradicted. Under these facts, the instruction was harmless beyond a reasonable doubt.

The finding of harmlessness below is correct for another reason. Intent to cause death was not at issue in the trial of this case. The sole defense presented at trial was self-defense. *See* R. 189-91, 496; § 45-3-102 Montana Code Annotated. The extensive psychological testimony introduced by the defendant was directed not to whether he intended to cause the victim's death, but rather why he intended to do so. *See* R. 490-514. The petition indicates that defendant's crucial witness was Dr. Tranel, the clinical psychologist. Petition at 12-13. His direct testimony concluded with these final statements:

> Q. [C]ould Mr. Hamilton have reasonably been placed in fear for his life?
>
> A. Yes, at that point he would have likely concluded that the impending threat required a defensive reaction on his part in order to preserve his integrity.
>
> Q. Could he have reasonably believed that it was either he or the aggressor at that time?
>
> A. Oh, yes.
>
> Mr. Kampfe: No further questions.

R. 513-14.

Even Dr. Tranel, the crucial defense witness, assumed that the defendant intended to cause the victim's death. Under these circumstances, the instruction to the jury was harmless error.

The presumption instruction did not affect the petitioner's defense by requiring the jury to discount Dr. Tranel's testimony. An intent to kill is not only compatible with the defense of self-defense, but is necessarily contained within it. "[S]elf-defense admits a purposeful act, but claims the purposeful act was justified." *State v. Sunday,* 37 S. Rptr. 561 (Mont. 1980). The jury's verdict of guilty of the lesser offense of mitigated deliberate homicide (§ 45-5-130, Montana Code Annotated) rather than deliberate homicide (§ 45-5-102 (1) (a), Montana Code Annotated) means the jury did in fact consider the psychologist's testimony in mitigation. The jury must have accepted the testimony that the defendant acted out of a genuine belief his life was endangered, but rejected the contention that such a belief was reasonable. *See generally State v. Freeman,* — Mont. —, 599 P. 2d 368, 373-74 (1979); M. Bassiouine, Substantive Criminal Law at 472 (1978); Perkins, *Self-Defense Re-Examined,* 1 U. C. L. A. L. Rev. 133, 133 n. 6 (1954). The instruction given requiring the jury to presume the intent to kill did not affect defendant's sole defense and was therefore harmless beyond a reasonable doubt.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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